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NO. 82-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BILL MOORE, ET AL.,
DEFENDANTS-PETITIONERS,
V.
PAUL E. SCOTT, ET AL.,
PLAINTIFFS-RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF
AND
BRIEF OF AMICUS CURIAE,
THE LEGAL FOUNDATION OF AMERICA

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*The majority of the original research upon which this brief was based was done for law school course credit by Nancy R. Wilson, who undertook the task while a law student at South Texas College of Law and completed it while a student at the University of Houston Law Center. Amicus curiae acknowledges this assistance with appreciation.

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BILL MOORE, ET AL.,
Defendants-Petitioners,
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PAUL E. SCOTT, ET AL.,
Plaintiffs-Respondents.

MOTION FOR LEAVE TO FILE BRIEF

The Legal Foundation of America ("LFA") moves for leave to file the attached amicus curiae brief and would respectfully show the Court as follows:

1. *Identification of Amicus Curiae:* LFA is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, LFA seeks to preserve economic freedom. Its attorneys have supported the market system of resource allocation and opposed unreasonable regulation in such diverse industries as commercial lending, uranium mining, broadcasting, health care services, and oil and gas production, among others. All litigation undertaken by LFA is approved by its Board of Trustees, a majority of whom are attorneys.

2. *Previous Appearance of LFA's Attorneys in the Fifth Circuit in this Case:* By leave of Court, attorneys for amicus curiae have already appeared in this case in the Fifth Circuit. Amicus is therefore familiar with the issues and its attorneys have participated in developing them.

3. *Interest of Amicus Curiae:* The right of association for economic purposes was a major concern of the drafters of the

statute in question here. Similarly, one of LFA's major purposes is to enhance the right of association for economic purposes. Conduct such as that of the defendants in this case threatens both individual freedom and the economic system, and LFA believes that the litigation initiated by plaintiffs here is an appropriate means of redressing or deterring such conduct.

4. *Desirability of an Amicus Curiae Brief:* The case is complex and includes multiple issues. This amicus curiae's primary activity is to address economic, social, or public policy issues in a manner not generally covered by parties to litigation. In this case, the limitation of section 1985(3) to the purposes intended by Congress without preventing the accomplishment of those purposes is a difficult undertaking, and amicus curiae may be able to assist the Court in developing the issues fully.

5. *Reasons for Believing that Existing Briefs May Not Present All Issues:* Amicus curiae has contacted counsel for plaintiffs-respondents in an effort to avoid duplication. The issue argued in this brief is important to the case but will not be argued by plaintiffs-respondents in the manner in which it is covered here. Specifically, this brief concentrates upon a single issue, namely, whether the right of association can be the focus of a 1985(3) action under the conditions of this case. Amicus curiae believes that the intent of Congress to allow such a suit is clear; that conclusion, however, is sharply contested by defendants-petitioners. Although plaintiffs-respondents are clearly represented by capable and diligent counsel, the proliferation of issues covered in the opinions of the Fifth Circuit make it difficult for one party to develop all important aspects of the case fully.

6. *Consent of Parties or Requests Therefor:* Amicus curiae timely requested consent of the parties. Respondents have consented, and their letter of consent is lodged with the Court. This Motion is filed because of the refusal of counsel for petitioners to consent.

FOR THESE REASONS, LFA requests that it be granted leave to file the attached amicus curiae brief.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

Amicus Curiae adopts the statements contained in paragraphs 1, 2 and 3 of the Motion preceding this brief, as showing the interest of amicus curiae. Amicus curiae is a non-profit corporation supporting a public interest law firm, the aims of which include protection of the market system as a means of resource allocation. Amicus believes that conduct such as that of defendants in this case impairs both individual freedom and the market system and that the litigation commenced by plaintiffs is an appropriate means to redress and deter that impairment.

STATEMENT OF THE CASE

Amicus Curiae adopts the Statement of the Case made by plaintiffs-respondents.

SUMMARY OF ARGUMENT

Amicus curiae does not wish to duplicate the detailed case-law and legislative analysis done by respondents, although we agree with that analysis and wish to express support for it. In-

stead, amicus curiae appears here in order to discuss the right of association and its protection under the statute in question.

Among the many arguments made by the defendant unions is the claim that section 1985(3) does not protect the right of association from invasion by private conspiracies. The argument is unpersuasive because interference by the Ku Klux Klan in citizens' exercise of the right of association was one of the most important evils toward which 1985(3) was directed. The purpose of this brief is to discuss the historical understanding of the "privileges and immunities" protected by 1985(3) and to show that the right of association was included in that term.

I.

The most authorative definition of "privileges and immunities" available to the drafters of 1985(3) is to be found in the case of Corfield v. Coryell, 4 Wash. Cir. Ct. Rep. 380, 6 Fed. Cas. 546 (no. 3, 230; C. C. Pa. 1823). Corfield was repeatedly cited in the congressional debate and has been referred to both before and since as the seminal case interpreting privileges and immunities. The Corfield definition includes all rights that are fundamental or natural to civilized society, and it is unquestionably intended to include the right of association.

II.

This court has recently characterized the right of association as among "the most natural privileges of man" and "almost as inalienable . . . as the right of personal liberty." [1] This right is squarely within the historical understanding of privileges and immunities held by the drafters of 1985(3). The right of association is so fundamental that it has been protected against private action even in the absence of legislation in some contexts, and it

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1 NAACP v. Claiborne Hardware Co., 102 S.Ct. 3409, 3437 n. 80 (1982), quoting A. de Tocqueville, Democracy in America 203 (P. Bradley ed. 1954).

would be anomalous if it were not protected under the congressional enactment at issue here.

Defendants' reliance on Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1976), is inapposite. The right asserted in Dombrowski arose under the due process and equal protection clauses, which are qualifications on government action and which therefore can be violated only when there is government action. The right of association is a fundamental right that is personal and individual, and it can be invaded by private conspiracies of the type prohibited by 1985(3).

III.

Even if state or governmental action is required (although amicus contends it is not), the record in this case shows sufficient governmental action to support relief. The record shows repeated warnings by defendants that their town was "union country," analogous to the "company town" of Marsh v. Alabama, 326 U. S. 501 (1946). The defendant unions are fostered, protected and given their extensive powers by governmental action, much in the manner of Burton v. Wilmington Parking Authority, 365 U. S. 715 (1961). The defendant unions' own testimony persuasively shows that the police force and other civil authorities were incapable of controlling union violence without the assistance of defendants. Defendants' violence in this case is thus precisely analogous to the Klan violence at which 1985(3) was directed.

ARGUMENT AND AUTHORITIES

Defendants concede, as they must, that section 1985(3) "covers private conspiracies." Brief of Petitioners at 5, citing Griffin v. Breckenridge, 403 U. S. 88, 101 (1971). The gist of defendants' argument, however, is that the statute does not reach "all tortious conspiratorial interferences with the rights of others," id., and that, according to defendants, section 1985(3) does not reach this case. One of the central arguments of defendants in support of this claim is that the right of association is not among the "privileges and immunities" of citizenship his-

torically protected by 1985(3).

Defendants' arguments in this regard are untenable, and it is the purpose of this brief so to demonstrate.

I. THE HISTORICAL UNDERSTANDING OF "PRIVILEGES AND IMMUNITIES," SET FORTH IN THE LANDMARK CASE OF CORFIELD V. CORYELL, CLEARLY INCLUDES THE RIGHT OF ASSOCIATION.

The most authoritative historical definition of the "privileges and immunities" that 1985(3) was intended to protect is to be found in Corfield v. Coryell, 4 Wash. Cir. Rep. 380, 6 Fed. Cas. 546 (no. 3, 230; C. C. Pa. 1823). Corfield was cited in the congressional debate, and it has been referred to both before and since the enactment of 1985(3) as the seminal case defining privileges and immunities.

A. The definition in Corfield v. Coryell of "privileges and immunities" includes those rights that are fundamental and natural rights of civilized society.

The historical understanding of privileges and immunities is given by the following excerpt from Corfield v. Coryell:

> The inquiry is, what are the privileges and immunities of citizens in the several states? *We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments;* and which have, at all times, been enjoyed by the citizens of the several states . . . What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and

> possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. *These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state,* in every other state, *was manifestly calculated . . . "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union."*

Id. at 551-52. [2]

Several aspects of this historical understanding are note-

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2 For a similarly conceived (although less definitive) historical formulation, see Abbott v. Bayley, 22-23 Mass. [5 Pickering] 89, 90-92 (1827).

worthy.[2a] First, it includes those rights that are "fundamental;" the court gives such examples as the rights to travel, to engage in professional pursuits, and to vote. The right of association is also a fundamental right.[3] Secondly, the definition is obviously intended to encompass those political rights that are essential to the workings of free, democratic government; the court expressly states that privileges and immunities include those rights "which belong, of right, to the citizens of all free governments." Again, the right of association is within the understanding. Third, the list of examples contained in Corfield v. Coryell is merely illustrative, not exclusive: There are "many others [i.e., other rights] which might be mentioned" (but they are "more tedious than difficult to enumerate"). Finally, although the right of association is not mentioned by its modern name, it is clearly identified as among these privileges and immunities, because the court states that the very purpose of the privileges and immunities clause is "to secure and perpetuate mutual friendship and

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2a There may be some differences between privileges and immunities of national citizenship and privileges and immunities of state citizenship. Corfield v. Coryell, of course, was concerned with the privileges and immunities of state citizenship, protected in article IV of the Constitution; 1985(3) is presumably concerned with the privileges and immunities of national citizenship contained in the fourteenth amendment, which it enforces. For several reasons, however, this distinction does not affect the reasoning set forth here. First, the Congress repeatedly cited Corfield v. Coryell in the debates on the Civil Rights Acts as showing the kinds of privileges and immunities it desired to protect. See authorities cited in note 6 below and accompanying text. Further, the same term--"privileges and immunities"--is found in article IV, the fourteenth amendment, and 1985(3), indicating close overlap. Finally, early interpretations of the fourteenth amendment clearly include the right of association within its protections. Thus even the Slaughterhouse Cases, 83 U. S. (16 Wall.) 36, 79 (1873), emphasize that "the right to peaceably assemble and petition for redress of grievances" is within the coverage of the fourteenth amendment. These rights have long been closely related to the right of association. Insofar as this right is concerned, the intended protection is clear under either state privileges and immunities or privileges and immunities of national citizenship.

3 See Part II(B) of this brief, below.

intercourse among the people," or, in other words, to protect the right of association. In summary, the right of association is squarely within the historical understanding of the term "privileges and immunities," which Congress adopted as the object of its protection by enacting 1985(3).

B. The definition of privileges and immunities in Corfield v. Coryell is the most authoritative statement of the historical understanding available, and it was repeatedly quoted in Congress during debate on 1985(3).

Corfield v. Coryell is not merely one of the cases dealing with privileges and immunities. It was the most important such case at the time of enactment of 1985(3). Prior to the enactment of the statute, the Corfield definition given above had been cited as authority in virtually every decision dealing with privileges and immunities. [4] Furthermore, within two years of the enactment of section 1985(3), the Corfield definition was cited with approval by this honorable Supreme Court in the Slaughter-House Cases, 83 U. S. (16 Wall.) 36 (1873). This near-contemporaneous adoption by this Court of the Corfield v. Coryell formula provides an unusually strong indication that it consti-

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4 The report of the case indicates that Corfield v. Coryell was cited in Atkinson v. Philadelphia & T. R. Co., Case No. 615; U. S. v. New Bedford Bridge, Id. 15,867; The Passenger Cases, 7 How. (48 U. S.) 556; Gilman v. Philadelphia, 3 Wall. (70 U. S.) 725; The Clinton Bridge, Case No. 2,900; U. S. v. Hall, Id. 15,282; U. S. v. Anthony, Case No. 14, 459; McCready v. Com., 94 U. S. 395; U. S. v. Petersburg Judges of Election, Case No. 16,036; Hall v. De Cuir, 95 U. S. 513; Williams v. Bruffy, 96 U. S. 183; Ex parte Kinney, Case No. 7,825; The Civil Rights Cases, 109 U. S. 47, 3 Sup. Ct. 47; Butchers' Union, etc., Co. v. Crescent City, etc., Co., 111 U. S. 764, 4 Sup. Ct. 658; People v. Marx, 99 N. Y. 386; Ex parte Chin King, 35 Fed. 356; Marvin v. Maysville St. R. & T. Co., 49 Fed. 437. Quoted in the Slaughter-House Cases, 16 Wall. (83 U. S.) 75, 97, 116, 117, 127.
6 Fed. Cas. at 546.

tuted the historical understanding. In addition, since that time, Corfield v. Coryell has been repeatedly cited by this court, most recently in such landmark decisions as Monell v. Dep't of Soc. Serv., 436 U. S. 658, 670 (1978) and Zobel v. Williams, 50 U. S. L. W. 4613 (1982) (separate opinion). [5]

Perhaps more importantly, Corfield v. Coryell was repeatedly cited or quoted in Congress as providing the definition of the "privileges and immunities" that the Civil Rights Acts were designed to protect. See, e.g., Cong. Globe, 42nd Cong., 1st Sess. 334 (1981) (remarks of Rep. Morgan, citing Corfield and quoting the language quoted above). [6]

II. THE FUNDAMENTAL CHARACTER OF THE RIGHT OF ASSOCIATION IS SUCH THAT IT IS SQUARELY INCLUDED WITHIN THE HISTORICAL UNDERSTANDING OF PRIVILEGES AND IMMUNITIES.

A. Defendants' reliance upon Dombrowski v. Dowling is inapposite, because the due process and equal protection pro-

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5 In modern history, Corfield v. Coryell has been cited by this honorable Supreme Court with approval in at least the following cases (in addition to those cited in the text): Jones v. Helms, 452 U. S. 412 (1981); Baldwin v. Fish & Game Comm., 436 U. S. 371 (1978); Austin v. New Hampshire, 420 U. S. 656 (1975); Lynch v. Household Finance Corp., 405 U. S. 538 (1972); Oregon v. Mitchell, 400 U. S. 112 (1970); Shapiro v. Thompson, 394 U. S. 618 (1969); Duncan v. Louisiana, 391 U. S. 145 (1968); United States v. Guest, 383 U. S. 745 (1966), and Poe v. Ullman, 367 U. S. 497 (1961).

6 See also, e.g., Cong. Globe, 39th Cong., 1st Sess. 475 (1866) (remarks of Sen. Trumbull on Civil Rights Act of 1866, citing Corfield v. Coryell); Id. 1835 (Rep. Lawrence, same). For a discussion of the indications that Corfield v. Coryell was the most important formulation recognized by the Congress, see Williams, "Liberty" in the Due Process Clauses of the Fifth and Fourteenth Amendments: The Framers' Intentions, 53 U. COLO. L. REV. 117, 131-32 (1981).

visions at issue in that case are qualifications upon government power, as distinguished from the right of association, which is personal and individual.

Defendants rely upon Dombrowski v. Dowling, supra, to argue that section 1985(3) does not reach the conspiracy at issue in this case. This conclusion is based upon a misapplication of Dombrowski v. Dowling, and defendant's reasoning amounts to an attempted repeal of this Court's decision in Griffin v. Breckenridge, 403 U. S. 88 (1971).

In Dombrowski, the rights asserted by the plaintiff were claimed to arise under the equal protection clause. Plaintiff protested the "unequal" refusal of a private building owner to rent to him. There is no constitutional right, "fundamental" or otherwise, to rent from the owner of a building. The court declined to hold that the equal protection clause, in and of itself, gave rise to privileges and immunities that could be asserted under 1985(3) in such a situation, because the equal protection clause, like the due process clause, is a limitation upon government conduct, and by itself it does not give rise to rights in the absence of any government action. Thus if monetary benefits are available, such as Aid to Families with Dependent Children, or if disadvantages such as onerous regulation are imposed upon anyone by government, they must be imposed on all similarly situated persons. However, the equal protection clause, by itself, does not give rise to any entitlement until advantages or disadvantages are created by government in the first place. For this reason, the equal protection clause is meaningless without either some more profound personal right within the concerns of a statute such as 1985(3) or some government action. Such was the holding of Dombrowski v. Dowling.

This case, which involves the right of association, is dramatically different. Entitlement to the right of association does not depend upon the government's having given it to anyone else. Instead, the right of association is fundamental, personal, and individual, as the decisions describing the right clearly indicate, and it can be infringed by private conduct such as defendants' conspiracy here.

B. The right of association squarely fits within the historical understanding of the "privileges and immunities" that are protected by section 1985(3).

(1) The right of association fits the historical understanding, and thus the intent of Congress, because it is fundamental.

The historical understanding of "privileges and immunities" emphasizes those rights that are "fundamental." Corfield v. Coryell, supra. There can be no question that the right of association is a fundamental right. This Court has written as follows:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and in acting in common with them. The right of association therefore appears . . . almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409, 3437 n. 80 (1982). [7]

The fundamental nature of the right of association [8] is also

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7 This formula not only expresses the current view of the right of association; it also expresses the historical understanding that was held at the time 1985(3) was enacted. The historical understanding is made clear by the fact that, in setting forth this formulation, the court was itself quoting from A. de Tocqueville, Democracy in America 203 (P. Bradley ed. 1954).

8 The fundamental character of the right extends equally to association for economic purposes. Indeed, in NAACP v. Claybourne Hardware Co., supra, the association was economic in nature. The case concerned the activity of consumers who organized a concerted economic boycott of certain merchants. This court, reversing the

indicated by the requirement of a compelling state interest to support enactments that infringe the right. See, e.g., NAACP v. Alabama, 357 U. S. 449 (1958); see also Brown v. Socialist Workers '74 Campaign Committee, 51 U. S. L. W. 4015 (U. S. S. Ct. 1982). The compelling-state-interest requirement is applied to such concerns as the rights to vote or to travel and to such "suspect classifications" as race; these are the concerns that have been characterized as most clearly within the protection of 1985(3). Cf. Griffin v. Breckenridge, supra.

(2) The right of association fits the historical understanding, and thus the intent of Congress, because it is similar in character to the rights given as examples of privileges and immunities in Corfield v. Coryell.

Corfield v. Coryell did not enumerate all "privileges and

Mississippi Supreme Court, held that the right to engage in this sort of economic association was fundamental in character.

The association here at issue was also political in nature, and this is a second reason for considering it protected. Economic association is closely related to political expression, often coincides with it, and indeed coincided with it in this very case. As the defendant unions' own arguments show, labor controversies such as this one are particularly important political issues in this geographic area, the "Golden Triangle." The associational rights asserted by plaintiffs, here, prompted what the defendant unions call a "citizens' protest, which led to the violence at issue. Defendants themselves emphasized, in their briefs in the Fifth Circuit, that the Golden Triangle is characterized by sharp political differences along "union/non-union lines," that labor union officials are influential community leaders, and that the local press often reports front-page political news concerning labor issues. See part III(A) of this brief, below, for record citations.

In connection with the concept of economic association as a protected privilege or immunity, it should also be pointed out that many of the rights given as examples in Corfield v. Coryell were purely economic in nature. Corfield mentions the right to reside in any state "for purposes of trade, agriculture, professional pursuits, or otherwise." It also emphasizes the right to "take, hold, and dispose of property." Id. at 551-52.

immunities," but it gave certain examples, including the right to vote and the right to travel. The decisions of this court leave little doubt that the right of association is comparable to these rights. For example, in Shapiro v. Thompson, 394 U. S. 618, 643 (1969), Mr. Justice Stewart directly compared the rights of travel and association, stating that the right to interstate travel

> is broadly assertable against private interference as well as governmental action. *Like the right of association, NAACP v. Alabama*, 357 U. S. 449 (1958), . . . it is a virtually unconditioned personal right, guaranteed by the constitution to us all.

The right of interstate travel is protected under the Civil Rights Act of 1871, see United States v. Guest, 383 U. S. 745 (1966), and the comparison thus indicates that the right of association is included within the core concerns of 1985(3) as well. [9]

(3) The right of association fits the historical understanding, and thus the intent of Congress, because it is essential to the democratic function of civilized government.

The historical understanding expressed in Corfield v. Coryell also emphasizes those rights that are essential to the political system or which "belong, of right, to the citizens of all free governments." Id. at 551. The right of association fits this understanding. This Court has described association as follows:

> We begin by recalling that the practice of persons sharing common views banding together to achieve a common end is deeply embedded

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9 See also Raggi, An Independent Right to Freedom of Association, 12 HARV. C.R.C.L.L. REV. 1, 11-18 (1977), for a discussion of the nature of the right.

> in the American political process. The 18th Century Committees of Correspondence and the pamphleteers were early examples of this phenomenon and the Federalist Papers were perhaps the most significant and lasting example. The tradition of volunteer committees for collective action has manifested itself in myriad community and public activities; in the political process it can focus on a candidate or on a ballot measure. Its value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost.

Citizens Against Rent Control v. City of Berkeley, 102 S. Ct. 434, 436 (1981).

(4) The right of association is so important that it has been judicially protected in some contexts even in the absence of legislation. Such protection should be more readily forthcoming under Congressional legislation such as 1985(3).

Rights of expression, petition, assembly and association have been protected by this Court from private infringement in some cases in which state action was remote or nonexistent. For example, in Marsh v. Alabama, supra, the court upheld the right of religious pamphleteers to enter, express themselves, and associate within the confines of a company town that was wholly privately owned. In cases involving broadcast frequencies, this Court has observed that the "purpose of the First Amendment" is to protect these fundamental rights from infringement, "whether it be by the government itself *or by a private licensee.*" Red Lion Broadcasting Co. v. FCC, 395 U. S. 367, 390 (1969). Even more recently, during the current term, the Court has held that private harrassment of minority political party members gives rise to constitutional protection under the right of association, even in the context of ostensibly neutral state disclosure requirements. Brown v. Socialists Workers '74 Campaign Committee, 51 U. S. L. W. 4015 (1982).

These holdings, it is to be emphasized, were reached on the basis of the Constitution itself, unaided by legislation. It would be anomalous if such protections of association were not found under such legislation as 1985(3), which is intended to supplement and enforce the Constitution.

C. The Congressional debates on the Civil Rights Act of 1871 make clear the legislative intent to include the right of association within the protection of 1985(3).

Two specific types of associational rights are mentioned with great frequency in the legislative history of the Civil Rights Act of 1871: The right to engage in political activity and the right of persons to engage in the "lawful and harmless pursuit of their proper vocation." Sen. Osborne, Cong. Globe 653, April 13, 1871. The legislative history is such as to leave no doubt that protection of the right of association was a central concern of those who enacted 1985(3).

The right of persons to engage in political association is mentioned so often in the legislative history of the Civil Rights Act of 1871 that it dwarfs even the references to racial discrimination. Sen. Sherman stressed that the Ku Klux Klan was "a political organization, with political ends, political aims." Cong. Globe 153, March 18. Rep. Shellabarger charged that the terrorism of the Klan was "done in execution of the political purposes" of that group. Id. 517, April 6. Rep. Roberts noted that acts of violence had been committed against various classes of individuals, but that the unifying theme was that all such groups were engaged in the constitutionally protected right of association with a political party (namely the Republican Party). Id. 412, April 3; see also Osborne, Id. 653, April 13. Numerous other legislators mentioned the political nature of the Klan and the need for the protection of individuals associated with particular organizations within the South. [10]

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10 Rep. Tyner, Cong. Globe 487, April 5; Rep. Wilson, Id. 481, April 5; Rep. Cobb, Id. 436, April 4; Rep. Sheldon, Id. 367, March 31; Sen. Edmunds, Id. 567, April 11; Sen. Stewart, Id. 659, April 13; Rep.

III. EVEN IF STATE ACTION IS REQUIRED UNDER 1985(3) (ALTHOUGH AMICUS CURIAE SUBMITS THAT IT IS NOT), THE RECORD IN THIS CASE CONTAINS AMPLE EVIDENCE OF GOVERNMENT ACTION SUFFICIENT TO SUPPORT A 1985(3) ACTION.

A. This event occurred in "union country," in which union action and governmental action were mutually interdependent in a manner analogous to the "company town" of Marsh v. Alabama.

In Marsh v. Alabama, supra, religious pamphleteers had been forbidden to exercise the rights of expression and association in the public places of a company-owned town. This court held that sufficient "government function" was to be found in the record of the case, so that these fundamental rights were protected from abridgement by ostensibly private action in the company town.

The record in this case strongly supports the conclusion that the violence here at issue occurred in a "union town."[11] Indeed, shortly before the violence began, the record shows that one of the rioters shouted, "Get out . . . man, you all have got to be crazy, you are all crazy, this is a union town." R. 45, testimony

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Showber, Id. 378, April 1; Sen. Schurz, Id. 686, April 14; Rep. Rainey, Id. 393, April 1; Rep. Perce, Id. 511, April 6; Rep. Lowe, Id. 374, March 31; Rep. Lansing, Id. 487, April 5; Rep. Corburn, Id. 457, April 4.

11 Amicus recognizes that the holding of Marsh is not applicable to private activity occurring in a smaller self-contained private enclave such as a shopping center. Hudgens v. NLRB, 424 U. S. 507 (1976). But the present case involves an entire "union town"–indeed, a whole geographic area–and a set of "private" entities, the defendant unions, that exhibit strong interdependence with government. Cf. Terry v. Adams, 345 U. S. 461 (1953).

of Mr. Scott. Ironically, the defendant unions--apparently oblivious to the constitutional significance of their position--have themselves characterized the area as union-dominated in this very litigation. The defendant's brief in the Fifth Circuit contains the following at the beginning of the Statement of Facts:

> Port Arthur, Texas, is one corner of a community generally referred to as the "Golden Triangle," the other two cities being Beaumont and Orange, Texas . . . . *[T]he Golden Triangle area is peculiar in terms of its socio-economic structure. Generally, there are large numbers of working class people concentrated in the area and these workers are highly unionized. The general citizenry of the community tends to align itself on union/non-union lines*, and labor relations is always a sensitive issue in the Golden Triangle, often capturing the front page of the local newspapers.
>
> Thus, the advent of a $8,000,000 non-union construction project in the community was a matter of some local interest . . .
>
> The Sabine area Building and Trades Council is a loose confederation of various construction craft unions in the area . . . and the council holds regular weekly meetings. During the meeting of January 15, 1975 . . . the rumor was discussed--the rumor was to the effect that there would be a "citizens protest" at the Cross Construction site on the following Friday . . . .

In their opening remarks at trial, counsel for both groups of defendants, with remarkable candor, admitted the existence of a local prejudice against non-union outsiders. "It is our understanding that Cross Construction Company employs largely employees from out of state, that local persons in this Golden Triangle area who are out of work might resent that fact." R. 15-16 (Mr. Wheat). Mr. Dies said the following:

> I think the evidence, your honor, will show

> that *what happened here is something indicative of this area we live in, and that is–not indicative of it, but arises from the fact the labor organizations are strong in this area* and when outside contractors come into the area, employing people from outside the state . . . *men working on jobs in the area here hear about it, they ask their union, they ask their officials* . . .

R. 20-21. Mr. Wheat described "unrest in the community with respect to Cross Construction Company . . . . The rumor was apparently very widespread . . . ." R. 235-36. In summary, the general citizenry of the community tended to align itself on union/non-union lines, labor relations was always a sensitive issue, the area was "A union town," and when major social issues arose, the citizenry turned to union officials because they were community leaders.

This political combination made it impossible for the police department or other civil authorities to control violence. The testimony of R. E. Culbertson, Sheriff of Jefferson County, dramatically shows the dependence of law enforcement upon the defendant unions in controlling labor violence. The message of Sheriff Culbertson's testimony was that control of violence sanctioned by union officials would be outside the capacity of civil authorities.[12]

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12 The sheriff testified that "there definitely would be the possibility of . . . a recurrence of this act because . . . of the unrest of the labor movement in this area." Persons such as defendants were engaged in surveillance of license plates of non-union workers, "and in certain ways [they] coerce or otherwise commit actual violence upon these people . . . away from the job site." When asked whether as a practical matter, such violence was "almost impossible for you to defend against?," the Sheriff replied: "It certainly is." At this point, the trial court interrupted to suggest calling in the statewide police force of the Texas Department of Public Safety or the Texas Rangers. R. 31-38.

B. The power and authority of the defendant unions is derived directly from state action.

In addition, it is important to realize that the defendant unions receive their authority and their right to serve as exclusive bargaining agents, as well as considerable statutory protection and, indeed, their very franchise, from government action. The National Labor Relations Act, 29 U. S. C. sections 151 et seq. (West 1964) provides as follows:

> It is declared to be the policy of the United States to [regulate commerce by] . . . encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Cf. Terry v. Adams, 345 U. S. 461 (1953) (the "Jaybird Primary" case) (use of private entities to carry out government policy is a strong indication of state action).

Labor unions are powerful entities. They are especially so, as the evidence shows, in the Golden Triangle area. It is important to emphasize that they derive this authority and power directly from government action expressed in the NLRA. This governmental grant of power and authority is analogous to the situation in Burton v. Wilmington Parking Authority, 365 U. S. 715 (1961). In that case, the Eagle Coffee Shoppe operated a restaurant in "a purely private capacity" under a lease from the State of Delaware. The holding of this Court was that state action existed because of the powers and "benefits . . . conferred" upon the restaurant owner by the state. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance," said the Court.

In this case, the defendant unions have the power to ex-

clude every individual worker from bargaining about his own wage and to serve as the exclusive agent in that process. This power is given the defendants directly by the federal government in the NLRA, and it confers a greater benefit (and consequently a greater responsibility) than that in Burton v. Wilmington Parking Authority, supra. As one commentator has written, "the union's position in the federal scheme of labor regulation, most notably its status as exclusive representative of all the employees in a bargaining unit," provides "the cornerstone" of an argument that "would find union activity to be governmental action."[13] Lang, Toward a Right to Union Membership, 12 Harv. C. R. C. L. L. Rev. 31, 41 (1977); see also Rauh, Civil Rights and Liberties in Labor Unions, 8 Lab. L. J. 874, 881 (1957).

C. Congress intended that the amount of state action shown in this record should suffice to prove a 1985(3) claim, because this situation is precisely analogous to the conditions that allowed the Klu Klux Klan to invade the right of association of Blacks and Republicans.

There can be little question that the drafters of 1985(3) intended it to apply in the circumstances disclosed by this record. Speaker after speaker rose to denounce the Ku Klux Klan and the state action (or lack thereof) that allowed it to flourish. The following is an example:

> I understand the argument to be that inasmuch as the alleged lawless acts sought to be corrected by the bill [i.e., those of the Ku Klux

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13 Amicus curiae recognizes that state action cannot be inferred from mere neutral regulation, or even "detailed regulation." E.g., Moose Lodge v. Irvis, 407 U. S. 163 (1972); Flagg Bros., Inc. v. Brooks, 436 U. S. 149 (1978). But the instant case involves direct grant of extensive powers. It also makes those powers exclusive, as in collective bargaining, and "exclusivity" is a feature indicating state action–as is the government's use of defendants to carry out national policy regarding commerce. Flagg Bros., Inc. v. Brooks, supra.

> Klan] are not done in pursuance of any law or act of the states, that as there is no state authority or laws impeding the citizens in the enjoyment of their rights, the section quoted does not apply. *It is said that the states are not doing the objectionable acts. This argument is more specious than real. Constitutions and laws are made for practical operation and effect* . . . . What practical security would this provision give if it could do no more than to abrogate and nullify the overt acts and legislation of a state? If a state has no law upon its statute book obnoxious to objection under the article referred to, but nevertheless permits the rights of citizens to be systematically trampled upon without color of law, of what avail is the constitution to the citizen?

Id. at 375 (remarks of Rep. Lowe). Another speaker said, "I do not want to see this [Civil Rights Act] so amended that there shall be taken out of it the frank assertion of the power of the national government to protect life, liberty and property, *irrespective of the act of the state*." Id. at 141 (remarks of Rep. Shanks). The drafters of 1985(3) were particularly concerned about the situation in which the state was unwilling (or unable) to provide protection of constitutional rights, a situation that the record amply demonstrates was prevalent in the Golden Triangle during the events that led to this suit.

In summary, there can be little question that the drafters of 1985(3) intended it to apply to private conspiracies, with or without governmental action.[14] But if it is concluded, contrary

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14 Defendants appear to argue that Congress may not have had power to deal with private conduct under circumstances such as these. This argument is refuted by, e.g., Katzenbach v. McClung, 379 U. S. 294 (1964) and United States v. Guest, supra. There can be no real question that Congressional power is present. Nor, in light of the legislative history, can there be any doubt of the Congressional intent to reach private conduct under the circumstances of this case.

to the arguments of this amicus curiae, that state action is required, there is ample evidence in this record demonstrating government interrelationship with the defendants and with the event, and this state action is clearly sufficient to support a 1985(3) claim if the intent of Congress is recognized.

CONCLUSION

For the reasons given herein, and for the reasons given in the brief of plaintiffs-respondents, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have, prior to the filing of this Brief, served three (3) copies each upon all counsel of record by depositing such copies in a United States Post Office, namely the Central Post Office at Houston, Texas, first class postage prepaid, addressed to: Martin Dies, Stephenson, Thompson & Dies, Box 490, Orange, Texas 77630 and Robert Q. Keith, Mehaffy, Weber, Keith & Gonsoulin, Box 155, Johnson City, Texas 78636, all in accordance with Rule 28.3 of the Rules of this Court.